STATE OF WISCONSIN PERSONNEL COMMISSION

EARNEST L. WILLIAMS,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 97-0086-PC-ER

INTERIM DECISION AND ORDER

NATURE OF THE CASE

On June 16, 1997, complainant, Earnest L. Williams, filed a charge of discrimination with this Commission alleging, *inter alia*, that respondent Department of Corrections (DOC), discriminated against him because of his conviction record when respondent threatened to terminate his employment, in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. In an initial determination dated August 23, 1998, the Commission found that there was probable cause to believe that complainant was discriminated against on the basis of arrest or conviction record when he was threatened with termination upon any subsequent charges of driving while intoxicated. This case proceeded to hearing on the following agreed statement of issue:

> Whether respondent discriminated against complainant on the basis of arrest or conviction record in violation of the Wisconsin Fair Employment Act in connection with the last paragraph of its January 3, 1997, letter to complainant:
>
> > This letter serves as a last chance warning. Failure to comply with the above conditions will result in termination of your employment. Additionally, any subsequent driving while intoxicated or similar charges will also result in termination of your employment. (Conference report dated July 20, 1998)

Following a hearing before a hearing examiner, and pursuant to §227.46(2), Stats., the examiner issued a proposed decision and order which now is before the Commission for its consideration.

DISCUSSION OF PROPOSED DECISION AND ORDER

This proposed decision concludes that while respondent's action did not violate §111.322(l) of the WFEA, it did violate §111.322(2). Section 111.322, Stats., provides, inter alia:

> **111.322. Discriminatory actions prohibited**
>
> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
>
> (1) To refuse to hire, employ admit or license any individual, to bar or terminate from employment . . . any individual or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment ... because of any basis enumerated in s. 111.321.[1]
>
> (2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111. 32 1..

The proposed decision notes that pursuant to the precedent established in *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97, employer actions such as investigations can involve an employe's "terms, conditions or privileges of employment," §111.322(l), notwithstanding they do not affect the employe's tangible conditions of employment, if they adversely affect the employe's work environment to the extent of creating a hostile environment. The proposed decision then concludes that the "last chance" warning did not create a hostile environment. However, it does conclude there was a violation of §111.322(2), because by distributing the letter containing the last chance warning to nine individuals, including a union official, it "circulated" a "statement" expressing respondent's intent to discriminate,[2] in violation of §111.322(2).

In its objections to the proposed decision, respondent argues, among other things, that the examiner decided the issue on a point of law which neither party had addressed. Respon-

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[1] Section 111.321, Stats., includes arrest record and conviction record in the enumeration of probihited bases of discrimination.

[2] I.e., among other things, respondent stated its intent to discharge complainant should he ever in the future be even charged with OWI.

dent pointed out that while it had not made a record of this at the hearing, all of the people who received a copy of the letter in question had either a management or a contractual need to know, and thus there was no "circulation" of the letter that would bring it within the purview of §111.322(2). Respondent's position on this point raises the question of whether the notice of hearing complied with the notice requirement of the Administrative Procedure Act (APA) at §227.44(2), Stats., or, put another way, whether the proposed decision violates the APA by addressing and deciding matters which are outside the scope of the issue for hearing.

To reiterate, the hearing issue to which the parties agreed was:

> Whether respondent discriminated against complainant on the basis of arrest or conviction record in violation of the Wisconsin Fair Employment Act in connection with the last paragraph of its January 3, 1997, letter to complainant:
>
> > This letter serves as a last chance warning. Failure to comply with the above conditions will result in termination of your employment. Additionally, any subsequent driving while intoxicated or similar charges will also result in termination of your employment. (Conference report dated July 20, 1998)

This notice refers to a violation of the WFEA without specifying a particular statutory section or subsection. Therefore, the more specific question is whether the language used can fairly be read as raising by implication the issue of whether respondent discriminated in violation of §111.322(2), Stats., by "circulating" the letter in question that includes the "statement" set forth in the last paragraph thereof.

If the issue had simply been stated as: "Whether respondent discriminated against complainant on the basis of arrest or conviction record in violation of the Wisconsin Fair Employment Act in connection with its January 3, 1997, letter to complainant," the argument that the issue related solely to the content of the letter as opposed to the dissemination of the letter would have less force. However, as actually worded, the issue appears to focus more on the letter's content, and more specifically, the last paragraph thereof: "Whether respondent discriminated against complainant on the basis of arrest or conviction record in violation of the Wisconsin Fair Employment Act in connection with the last paragraph of its January 3, 1997, letter to complainant: [paragraph of letter set forth verbatim]."

There are other factors that support this reading of the issue. The original complaint which initiated this proceeding, and which presumably was drafted by complainant's attorney, makes no reference to the dissemination of the letter, but states (as relevant): "The Department of Corrections has threatened complainant with termination due to his conviction record." The Commission's Initial Determination neither mentioned anything about the dissemination of the subject letter, nor addressed the possibility of a §111.322(2), Stats. violation. At the hearing stage of this matter, neither party addressed the specific issue of a §111.322(2) violation in their arguments, and neither presented any more than peripheral evidence bearing on the dissemination of the letter.

The circumstances of this case are somewhat similar to a leading case in this area of law, *Wisconsin Telephone Co. v. ILHR Dept.*, 68 Wis. 2d 345, 228 N. W.2d 649 (1975). The complaint in that case ostensibly addressed the issue of whether respondent's policy for allowing leave to pregnant women constituted sex discrimination. In its final decision, DILHR concluded that the employer's policy on benefits for maternity leave was discriminatory. The Court's discussion of the notice issue included the following:

> The notice of hearing by the department merely informed the company it had been charged with an "act of discrimination due to sex, within the meaning of Chapter 111 of the Wisconsin Statutes." A copy of the complaint was attached to the notice. The complaint alleged that the company's "policy regarding maternity leave is discriminatory," and alleged as the "act" of discrimination the fact that the company refused to rehire the complainant as soon as she was medically able to return to work. Neither the notice of hearing nor the complaint attached contained any specific reference of any kind to the company's pregnancy leave benefits policy.
>
> The department argues the following language in the complaint put the company on notice that the benefits policy would be an issue:
>
> > "I am not receiving Unemployment Compensation even though I am able to work. I have no money coming in."

> We disagree for two reasons. First, this is hardly a "clear and concise statement"[3] of the benefits issue. Second, in its initial determination of probable cause, the department characterized Karen Smith's complaint as follows:
>
> > "Complaint was filed April 14, 1972, charging that Respondent had discriminated against complainant in her conditions of employment because of her sex *by requiring her to remain on maternity leave for a specified period of time. " (Emphasis* supplied)
>
> The balance of the initial determination detailed facts relating to the circumstances surrounding [complainant's] acceptance of maternity leave and the company's policy regarding duration of leaves and re-employment prior to the leave's expiration. Thus, based upon the department's own interpretation of the complaint the telephone company had every reason to assume that the leave policy itself, rather than benefits available to those on leave, would be the only issue. It cannot be disputed that these are two separate and distinct legal issues and that the telephone company was entitled to notice as to both if both were to be raised at the hearing.
>
> The lack of adequate notice is reflected in the case presented at the hearing by the telephone company . . . it is manifest that the question of pregnancy leave benefits was not fully litigated and that this deficiency was not due to neglect of the telephone company, but rather to inadequate notice. 68 Wis. 2d at 355-57. (footnotes and citations omitted).

Similarly, in the case at bar the complaint does not mention the dissemination of either the letter or the last chance warning. The initial determination also does not mention this issue. The issue for hearing arguably is broad enough to encompass the question of a §111.322(2), Stats., violation, but the thrust of the notice is on the language used in the last chance warning, not the dissemination thereof. Finally, neither party addressed the issue prior to the issuance of the proposed decision and order.

Bracegirdle v. Board of Nursing, 159 Wis. 2d 402, 464 N. W.2d 111 (Ct. App. 1990), also supports a conclusion that the proposed decision erred in addressing matters outside the

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[3] This is a reference to the language of §227.09, Stats. (1973) which provided that: "Every party to a contested case shall be given a clear and concise statement of the issues involved." The corollary provision in the current law, §227.44(2)(c), Stats. (1997-98) is: "The notice shall include . . . (c) A short and plain statement of the matters asserted. If the matters asserted cannot be stated with specificity as the time the notice is served, the notice may be limited to a statement of the issues involved."

scope of the notice of hearing. That case involved a license revocation proceeding before the Board of Nursing. The notice was provided by a charge "that Bracegirdle 'used excessive force in the removal of . . . dentures from [resident] J. N.'s mouth, resulting in some bruising of the resident's face,' in violation of Wis. Adm. Code sec. N 7.04." 159 Wis. 2d at 410. The hearing examiner concluded that the charges against Bracegirdle were not sustained because "'the preponderance of the evidence does not show that [Bracegirdle] used excessive or inappropriate force in her attempt to remove dentures from the mouth of J. N.,'" *id.*, and recommended that the complaint against her be dismissed:

> The board adopted the examiner's finding that there was no credible evidence that Bracegirdle used or allowed other staff to use "excessive or inappropriate" physical or verbal methods to persuade J. N. to remove or allow staff to remove his dentures. The board, however, amended the examiner's conclusions of law by striking the reference to the degree of force used by Bracegirdle and added the following:
>
> > [A]ttempting by the use of verbal and physical encouragement to persuade J. N. to open his mouth when he declined to do so constitutes an act of force or mental pressure which reasonably could cause physical pain or injury, or mental anguish or fear, in violation of Wis. Adm. Code sec. N 7.04(4). 159 Wis. 2d at 410-11.

The Court went on to address the question thus raised as follows:

> In oral argument before the circuit court, the board conceded that its whole case was tried on the board's complaint that Bracegirdle used excessive physical force in attempting to remove the patient's dentures ....
>
> What the parties tried was not what the board decided. Fundamental fairness, however, required that the board decide Bracegirdle's "guilt" or "innocence" of the charges against her, not charges based on the board's interpretation of Wis. Adm. Code sec. N 7.04, announced for the first time in its decision. Had Bracegirdle been charged with violating the code provision by verbal and physical encouragement of the patient, she may have been able to show by expert testimony that appropriate verbal and physical encouragement of an uncooperative patient does not fall below the minimum standards for the nursing profession. 159 Wis. 2d at 418 (footnote omitted)

The circumstances of the instant case are also similar to the circumstances in *Bracegirdle*. The issue for hearing was stated as: "Whether respondent discriminated against com-

plainant on the basis of arrest or conviction record in violation of the Wisconsin Fair Employment Act in connection with the last paragraph of its January 3, 1997, letter to complainant . . ." While the issue was not by its terms limited to an alleged violation of §111.322(l), Stats., as opposed to §111.322(2), that is inferred, and it was on that basis that the parties tried and argued the case. If respondent had anticipated that the latter subsection were going to be at issue, it could have presented at the hearing the evidence about the status of the recipients of the letter referred to in its objections to the proposed decision and order. Also, *c. f. In Interest of Baby Girl K.,* 113 Wis. 2d 429, 448, 335 N. W.2d 846 (1983) ("Consideration of a constitutional issue raised for the first time on appeal is discretionary with this court and will be done "if it is in the best interests of justice to do so, and *if both parties have had the opportunity to brief the issue and if there are no factual issues that need resolution."* (citations omitted) (emphasis added)).

While the Commission concludes the hearing examiner erred in deciding an issue that was not properly noticed, there remains the question of how to proceed from here. Now that the §111.322(2), Stats., issue has been identified, one option would be to remand the case to the hearing examiner with directions to permit the parties to have further input on this issue. The other option would be to order this (§111.322(2)) claim dismissed on the basis that complainant waived his right to proceed with this claim by failing to have raised or addressed it while the case was before the hearing examiner. The reported cases, while apparently not establishing a clear cut rule to apply in such circumstances, are consistent with a remand for further proceedings before the hearing examiner.

In *Gen. Elec. Co. v. Wisconsin E. R. Bd.*, 3 Wis. 2d 227, 88 N.W.2d 691 (1958), the Wisconsin Employment Relations Board (Board) held a hearing on an unfair labor practice complaint. The issue before the Board concerned the question of whether the employer had violated the seniority and transfer provisions of the contract by its transfer of employes between departments. The Board ruled in favor of the employer on this point, but it also ruled that the employer had violated the wage supplement provision of the contract. The Supreme Court stated that the issue before it was whether the Board acted "in excess of its powers when it made a finding on a question which was not in issue and which was not litigated by the par-

ties." 3 Wis. 2d at 236. The Court concluded that the Board had done so and that its order with respect to the wage supplement was in excess of its authority and void, the court noting that "Matters which the company probably could have presented had it been aware that an issue with respect to incentive pay existed, were not offered." 2 Wis. 2d at 245. However, without explicitly addressing the option of simply dismissing the complaint on the ground that the union had waived its right to advance a wage supplement issue, the Court concluded "that in the interest of justice the cause must be remanded to the board where opportunity is to be granted for a full hearing with respect to the issue." 3 Wis. 2d at 246. The Supreme Court cited *General Electric* extensively in *Wisconsin Telephone Co. v. ILHR Dept*, 68 Wis. 2d 345, 228 N.W.2d 649 (1975). In the latter case, DILHR had inappropriately interjected an issue concerning the employer's benefits policy for employes on leave into a case which ostensibly had been heard on an issue concerning only the employer's failure to rehire the employe as soon as she was medically able to return to work following pregnancy leave. The Court also concluded DILHR had made two other procedural errors (failure to have a quorum of the commissioners present at oral argument and the invalid promulgation of administrative rule). The Supreme Court affirmed the trial court's judgment that DILHR had committed reversible procedural errors, but reversed the circuit court's order directing DILHR to dismiss the complaint and directed the trial court to remand the case to DILHR "for further proceedings rather than dismissal." 68 Wis. 2d at 348.

In *Bracegirdle v. Bd. Of Nursing*, 159 Wis. 2d 402, 464 N.W.2d 211 (Ct.App.1990), the Court also remanded the case to the agency for further proceedings, notwithstanding the conclusion that the agency's order was void on due process grounds because the case had been decided on a theory that the parties had not tried:

> Section 227.57(4), Stats., requires that the reviewing court remand the case to the agency for further action if it finds that the fairness of the proceedings has been impaired by a material error in procedure. *The fact that the board's order is void because it violated Bracegirdle's procedural due process rights does not prevent us from remanding the case to the board for further proceedings upon adequate notice.* The proceedings were remanded in *General Electric* and *Durkin* [*v. Board of Police and Fire Commissioner*, 48 Wis. 2d 112, 180 N.W.2d 1 (1970)]. However, remand is unnecessary in this case because a correct interpretation of Wis. Adm. Code sec. N 7.04 (4) requires that the board's order be set aside and

> the complaint dismissed.[4] Sec. 227.57(5), Stats. 159 Wis. 2d at 420. (emphasis added)

The foregoing cases are consistent with the principle that courts (or other adjudicative bodies) should decide cases on the basis of the result the law requires, regardless of whether the particular legal theory is brought to bear by the parties or by the court, so long as the parties have sufficient notice and an adequate opportunity to be heard on the issue in question. *See State v. Weller*, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991)(on motion for reconsideration):

> The issues before the court are the issues presented in the petition for review* and not discrete arguments that may be made, pro or con in the decision of an issue either by counsel or by the court.[5]
>
> *The terms, "argument" and "issue" are defined as follows in *Webster's Third New International Dictionary:*
>
> *Argument:* 2a a reason given for or against a matter under discussion; 3b a coherent series of reasons, statements, or facts intended to support or establish a point.
>
> *Issue:* 6a a point in question of law or fact; *specify:* a single material pint of law or fact depending in a suit that is affirmed by one side and denied by the other and that is presented for determination at the conclusion of the pleadings.
>
> It should be noted also that the Judicial Council comment to sec. (Rule) 809.62(2), Stats., points out that the petition should state "how the court of appeals decided the issues." It is thus clear that an issue as used in that rule, as the above definition points out, is the point of law that is presented for final determination at the conclusion of the legal proceeding.

See also State v. Davis, 171 Wis. 2d 711, 722, 492 N.W.2d 174 (Ct. App. 1992): ("'[w]e may sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether we do so *sua sponte* or at the urging of a respondent.'"); *State v. Holmes*, 106 Wis.

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[4] In the instant case, a remand to the examiner also would not be indicated if the Commissin could conclude as a matter of law that respondent had not violated §111.322(2), Stats., as to the promulgation of the "last chance warning." However, since the Commission is unable to so conclude, that option is unavailable.

[5] The dissent in this case expounds at length on the inherent difficulty of distinquishing between legal issues and legal arguments. *Id*, 791-96.

2d 31, 38, 315 N.W.2d 703 (1982) ("That a court should raise issues *sua sponte* is the natural outgrowth of the court's function to do justice between the parties.")

In the latter case, the Supreme Court held that in some cases, "even where the parties waive the issue, a court 'should raise the [constitutional] question itself where it appears necessary to the proper disposition of a case." (citations omitted) 106 Wis. 2d at 40. The Court also noted that allowing the parties an opportunity to be heard on such issues "diminished or eliminated" any "theoretical impropriety of the circuit court's usurping the function of counsel or interfering with the adversary system or of the theoretical unfairness to the litigants." 106 Wis. 2d at 40-41. This holding also is consistent with remanding the instant case to the examiner for further proceedings. *See also Slawinski v. Milwaukee Fire and Police Commission,* 212 Wis. 2d 777, 818; 569 N.W.2d 740 (Ct.App. 1997)(where a due process issue was first raised b the circuit court *sua sponte,* the proceeding was remanded to the commission where "the parties will have the opportunity to develop the factual record . . . as necessary and appropriate to allow them to litigate the due process issues identified by the circuit court.")

For these reasons, the Commission rejects so much of the proposed decision and order as is inconsistent with the foregoing, and remands this matter back to the examiner for further proceedings consistent with the foregoing. The findings of fact that appear in the proposed decision were primarily stipulated and do not appear to be disputed by either party. Therefore, the Commission will adopt them.

The Commission notes respondent's argument in its objections to the proposed decision that "there is a substantial relationship[6] between the job of an officer and a conviction for criminal OWI." (Respondent's objections, p. 3). This argument apparently runs to the question of whether respondent violated §111.322(2), Stats., and since this is part of the issue on which this matter will be remanded to the examiner for further proceedings, the Commission will not

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[6] Section 111.335(l)(c), Stats., provides:

> Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to . . . terminate from employment . . . any individual who:
>
> > 1 Has been convicted of any felony, misdemeanor or other offense the circum stances of which substantially relate to the circumstances of the particular job . . .

address it further at this time. The Commission sets forth below the findings and those parts of the conclusions of law and opinion in the proposed decision which it adopts.

FINDINGS OF FACT[7]

1. Complainant is employed by respondent as a Correctional Officer 3 at the John C. Burke Correctional Center.

2. Complainant was convicted of operating while intoxicated [OWI] on November 15, 1996. Complainant was sentenced to the following: alcohol assessment, forfeiture and fine totaling $1,234, local jail sentence of 75 days with Huber privileges[8] commencing on January 14, 1997 (the first thirty days to be served in the DC [Dodge County] jail; forty-five days on electronic monitoring; with good time credit given to both sentences), license revoked for thirty months and ignition interlock for thirty months.

3. The conviction was complainant's third offense for operating while intoxicated.

4. On January 3, 1997, complainant received a letter from respondent notifying complainant of a five day suspension without pay and additional reprimands. The letter follows, in relevant part:

Dear Mr. Williams:

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[7] "In addition to the evidence submitted by the parties at the hearing, the parties stipulated to the facts contained in the investigative summary section of the initial determination. Accordingly, Findings 1-6 below are taken verbatim from the initial determination, with the addition of certain bracketed material based on the hearing record, and additional findings 7 and 8." Proposed decision and order, pp. 1-2.

[8] Section 303.08, Stats., follows:

> "Huber Law"; employment of county jail prisoners.
> (1) Any person sentenced to a county jail for crime, nonpayment of a fine or forfeiture, or contempt of court, may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:
> (a) Seeking employment or engaging in employment training;
> (b) Working at employment;
> (bn) Performing community service work under s. 973.03;
> (c) Conducting any self-employed occupation including housekeeping and attending the needs of the person's family;
> (d) Attendance at an educational institution; or
> (e) Medical treatment.

This is notification of a five (5) day suspension without pay for violation of the Department of Corrections Work Rule #A2, Category C, "Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy.", [sic] [brackets in original] specifically, the Department Arrest and Conviction Policy. The dates of your suspension are January 7, 8, 11, 12 and 13, 1997.

On December 12, 1996, a pre-disciplinary hearing was held with Assistant Superintendent Calvin Landaal, at which time you acknowledged you were arrested on October 19, 1995, for Driving while Intoxicated. This was your third *(3rd)* offense of this nature.

As a result of the arrest on October 19, 1995, you were convicted of Driving While Intoxicated on November 19, 1996, and received the following disposition from Dodge County Circuit Court . . . .

While you are serving the jail term and on electronic monitoring, you are considered unfit for duty and therefore, prohibited from reporting for duty at the John C. Burke Correctional Center. You may use vacation, Saturday Legal Holiday or Personal Holiday during this time period. If you are placed in an in-patient AODA treatment program or a mental health facility, you may use sick leave.

To retain your employment with the Department of Corrections, you must submit to the following:

- An assessment by a provider of the Department's choice, at the expense of the Department. You will be notified in writing of the date of the assessment. You will be paid for the time off for the assessment;
- Must sign an Authorization for Release of Information to allow management to communicate with any health personnel including therapist, etc., that are involved in the assessment and/or follow-up treatment;
- Agree to any and all treatment outlined in the assessment. If treatment is required, it will be your responsibility or the responsibility of your health insurance to pay for treatment. Additionally, you will be required to use a leave balance or be on leave without pay for the time in treatment;
- Random urinalysis to be conducted by a certified outside laboratory or clinic for one (1) year. Payment for the urinalysis will be at your expense or at the expense of your health care provider.

This letter serves as a last chance warning. Failure to comply with the above conditions will result in termination of your employment. Additionally, any subsequent driving while intoxicated or similar charges will also result in termination of your employment.

[Respondent issued what it denominated a "corrected letter" of discipline under date of September 18, 1998, which was six days before the hearing on the merits but after the hearing had been scheduled. The only substantive change from the original (January 3, 1997) letter was in the last sentence wherein the word "charges" was replaced with the word "convictions." Both versions of the letter were copied to nine people, including "Robert McLinn, Local 18"]

5. To receive income while serving his jail sentence, complainant used approximately 200 hours of accumulated vacation time, twenty-four (24) hours of personal holiday time, 100 hours of Saturday/Legal Holiday time, four (4) hours of Sabbatical time and approximately twenty-one (21) hours of leave without pay.

6. Respondent's Executive Directive 42 states, in relevant part:

> DEPARTMENT OF CORRECTIONS POLICY REGARDING THE EMPLOYMENT OR RETENTION OF INDIVIDUALS HAVING AN ARREST OR CONVICTION RECORD
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> . . . .
>
> II. POLICY STATEMENT
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> To help ensure that the Department meets its mission and at the same time complies with the Wisconsin Fair Employment Act, it is Department policy that records of pending criminal charges and convictions be considered in employment decisions only when the circumstances of the pending charge or conviction are substantially related to the job. Municipal ordinance violations may be considered. Additionally, being under the custody, control or supervision of a federal, state or local law enforcement agency or having a felony conviction record may restrict employment in certain classifications or restrict the performance of regularly assigned duties and responsibilities. (For example, correctional officers may not have a felony conviction record under s. 941.29, Stats., since they are required to be able to possess firearms as part of their duties and responsibilities.
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> . . . .
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> IV. PROCEDURE
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> . . . .
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> B. CRIMINAL ACTIVITY OF CURRENT EMPLOYEES

. . . .

A current employee who is charged with or convicted of an offense occurring on or off duty may be subject to discipline for the conduct which gave rise to the pending charge or conviction. Disciplinary action based on the underlying misconduct may proceed prior to charges being filed or a conviction being obtained.

V. NEXUS BETWEEN POSITIONS/CLASSIFICATIONS AND OFFENSES

A person may not be discriminated against on the basis of a pending charge or conviction record unless there is a substantial relationship between the circumstances of the criminal offense and the circumstances of the job. (See s. 111.335, Stats.) This test emphasizes a review of the circumstances which foster criminal activity, for example, the opportunity for criminal behavior. In determining the relationship between the job and the offense, the appointing authority shall look at the impact of the offense or the charge on the department's operations and interests.

A. JOB RELATED OFFENSE FACTORS

In determining whether or not the circumstances of a pending charge or conviction are substantially related to the circumstances of a job the following job related offense factors are considered:

1. The Job
a. the nature and scope of the job's public, inmate or client contact;
b. the nature and scope of the job's discretionary authority and degree of independence in judgment relating to decisions or actions which affect the care and custody of inmates, the commitment or expenditure of funds;
c. the opportunity the job presents for the commission of offenses;
d. the extent to which acceptable job performance requires public, inmate or client trust and confidence;
e. the amount and type of supervision received in the job; and
f. the amount and type of supervision provided to subordinate staff, if any.

2. The Offense
a. whether the elements of the offense (as stated in the statute or ordinance the employee is charged under or convicted of) are substantially related to the job duties;
b. whether the circumstances of the pending charge or conviction arose out of an employment situation;

c. for current employees, whether the conduct giving rise to the pending charge or conviction occurred during the working hours, on state property or involved the use of state property or involved other state employees or clients;
d. whether intent is an element of the offense; and
e. whether the offense was a felony, misdemeanor or other.

B. ADDITIONAL CONSIDERATIONS

1. Effective April 8, 1996, current DOC employees who supervise inmate or clients (for example, officers, social workers, recreation leaders, industry specialists and probation and parole agents) and who are under the custody, control or supervision of a federal, state or local law enforcement agency, including a jail sentence with Huber privileges under s. 303.08, Wis. Stats., are considered unfit for duty on the grounds that the circumstances of the custody, control or supervision negatively impact on the department's operations and interests and on the employees' [sic] [brackets in original] ability to effectively perform their duties and responsibilities.

In situations involving jail sentences with Huber privileges under s. 303.08, Wis. Stats., employees may be placed on leave without pay status. Employees who are granted a leave of absence may use vacation or holiday leave or compensatory time as a substitute for leave without pay. Sick leave may be used only if the individual is serving jail time in an inpatient AODA treatment program or a mental health facility.

. . . .

C. OFFICER AND RELATED POSITIONS AND AGENT AND RELATED POSITIONS

Appendix 1 contains the listing of offenses which have been determined to be substantially related to officer, agent and related positions for the purposes of this policy. This listing is based on current classification titles and work assignments.

As position classification titles, functions and work environments are created or changed, this listing should be used as a guideline to illustrate the nexus standard. The listing of job functions does not identify every duty and responsibility assigned but identifies those to which there is a nexus with a related offense.

Similarly, the listing of related offenses is based on Wisconsin Statutes. It is not intended to be exhaustive. The list is subject to change as criminal statutes are amended. Crimes which occur in different jurisdictions may be titled or defined differently but still may be substantially related to the position.

. . . .

Department of Corrections
Arrest and Conviction Record Policy
Appendix 1

1. Officer and Related Security Positions:

Titles:
Institution Security Director 1 and 2; Officer; . . .

Job Functions:
Supervision and care of inmates; responsible for maintaining a secure environment and for ensuring the safety at large; employes have continuous inmate contact and/or have a great deal of authority over them; staff must use independent judgment to maintain order and security; acceptable performance requires public as well as inmate trust, confidence and respect; responsibility for inventory, receiving and transporting inmate property; . . . transportation and supervision of inmate trips.

Related Offenses:
Crimes against life and bodily security (ch. 940) . . .
Crimes against public health and safety (ch. 941) including but not limited to: illegal use or possession of weapons
Crimes against property (ch. 943) . . .
Crimes against sexual morality (ch. 944) . . .
Crimes against government and its administration (ch. 946) . . .
Crimes against children (ch. 948) . . .
Crimes against animals (ch. 951) . . .
Violations of the uniform controlled substances act (ch. 161) . . .

7. Respondent requires CO's to maintain valid driver's licenses because their general duties and responsibilities include driving motor vehicles and transporting inmates. Respondent does not terminate all employes who fail to maintain valid driver's licenses.

8. Respondent has a policy for dealing with employes who are required to have a valid driver's license and who are convicted of OWI offenses. For a first time OWI offense, if it is civil rather than criminal under the Wisconsin statutes[9], an employe is given a verbal warning and required to follow court-ordered assessment and treatment, and to secure an occu-

pational license. For a second time OWI conviction, if it is criminal rather than civil, an employe receives some measure of discipline, is required to undergo an AODA assessment at the employer's expense, to comply with treatment recommendations, and to secure an occupational license. If an employe incurs what for him or her is a second (criminal) OWI conviction that is his first under the policy—e. g, if the employe had one OWI conviction shortly before becoming employed by DOC and then has another OWI conviction that is criminal—respondent treats it as a second conviction under its policy. For a third time OWI conviction, if it is criminal rather than civil, the employe is discharged.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

Complainant claims that respondent discriminated against him on the basis of his conviction record when it threatened to terminate complainant's employment for any subsequent OWI or similar charges. In the typical case, to establish that complainant was discriminated against because of his conviction record, the facts must show: (1) complainant has a conviction record within the meaning of the Fair Employment Act, §111.32(3), Stats.; (2) complainant suffered an adverse term or condition of employment because of his conviction record; (3) respondent's action does not fall under the exceptions in §111.335, Stats.

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[9] *See* §346 65(2), Stats., regarding the treatment of such offenses as civil or criminal.

With respect to the first element, complainant has a conviction record[10] which was respondent's primary reason for informing complainant that any subsequent driving while intoxicated charges would result in his termination.

The next question is whether the last paragraph in respondent's January 3, 1997, letter to complainant[11] constitutes an adverse term or condition of employment. Respondent argues as follows:

> This [last] sentence warns Complainant that "any subsequent driving while intoxicated or similar charges will also result in termination." While the choice of the word "charges" may have been unwise, Respondent did not in fact take any action which adversely affected Complainant's employment based on criminal charges or convictions. At worst, Respondent fairly warned complainant that he should avoid criminal drunk driving or there would be a consequence affecting his employment. A warning to avoid criminal behavior is hardly an adverse action. (Respondent's post-hearing brief, p. 3)

Section 111.322, Stats., provides, inter alia:

> **111.322. Discriminatory actions prohibited**
>
> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
>
> (1) To refuse to hire, employ admit or license any individual, to bar or terminate from employment . . . any individual or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment . . . because of any basis enumerated in s. 111. 321.[12]
>
> (2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with

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[10] "Conviction record includes, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned , placed on extended suspension, or paroled pursuant to any law enforcement or military authority." §111.32(3), Stats.

[11] "This letter serves as a last chance warning. Failure to comply with the above conditions will result in termination of your employment. Additionally, *any subsequent driving while intoxicated or similar charges will also result in termination of your employment."* (emphasis added)

[12] Section 111.321, Stats., includes arrest record and conviction record in the enumeration of prohibited bases of discrimination.

> respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

While this Commission apparently has never ruled on the question of whether a warning of the nature involved here constitutes an adverse employment action under the WFEA, in *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97, it addressed the question of whether the employer's action of investigating complainant with respect to an allegation of sexual harassment made by another employe implicated the complainant's "terms, conditions or privileges of employment," §111.322(l). The Commission's opinion includes the following:

> [T]here are two ways that an employer can take averse employment action with respect to "terms, conditions or privileges of employment." The first type of action affects the tangible conditions of employment-i. e., employment status per se-such as a transfer to a less desirable position or the assignment of less desirable work. The second kind does not affect the employe's employment status per se but has an adverse effect on the employe's work environment-for example, a supervisor calling an employe stupid. However, precedent establishes that in order to be actionable, the action must be sufficiently opprobrious to create a hostile environment. *Klein, p.* 8. (citations omitted)

The Commission went on to find that complainant had failed to establish a hostile environment:

> The Commission does not believe it can infer from the facts of record that a reasonable employe similarly situated to complainant would experience the handling of this one pre-disciplinary process as a hostile work environment. While it is safe to assume that any allegation of employe misconduct will result in some degree of stress, we are dealing here with a single incident, which did not result in the pursuit of any disciplinary action against complainant. *Klein, pp.* 8-9. (footnote omitted)

In the instant case, the complainant also has failed to show a hostile environment. As respondent contends, complainant merely was warned concerning respondent's intention in the event of another OWI Obviously, since the warning ran to a future traffic violation by complainant that might or might not occur, management's action did not even involve an investigation, as in *Klein*. Therefore, complainant has failed to establish either a prima facie case or a violation of §111.322(l), Stats.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(l)(b), Stats.

2. Complainant has the burden of persuasion with respect to establishing "that respondent discriminated against complainant on the basis of arrest or conviction record in violation of the Wisconsin Fair Employment Act [§111.322(l), Stats.] in connection with the last paragraph of its January 3, 1997, letter to complainant." (stipulated issue for hearing set forth in the July 20, 1998, conference report.

3. Complainant has not satisfied his burden of establishing that the last chance warning in said paragraph constitutes a violation of §111.322(l), Stats.

4. The question of whether the last chance warning in said paragraph violates §111.322(2), Stats., because it expresses an intent to unlawfully terminate complainant's employment in contravention of the WFEA's prohibition of arrest or conviction record discrimination, and because it constitutes a "statement" that respondent caused to be "circulated," was not noticed as part of the issue for hearing, and should not have been addressed by the hearing examiner without first providing the parties additional notice and an opportunity to be heard.

ORDER

This matter is remanded to the hearing examiner for further proceedings consistent with this decision.

Dated: March 24, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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